EXPLANATION.

Before entering into a statement of the facts in this case, we call the court's attention to what will no doubt appear perfectly obvious upon further examination of the record and briefs, i. e., that the argument on the demurrer in the lower court practically resolved itself into a trial of the case, and that appellant, both by virtue of the record made in the lower court and its brief filed in this court, has waived the right to hold appellee to the strict rule governing a demurrer to a petition. On page 51 of his brief, counsel for appellant says:

> Appellee, by demurring to the question, has admitted the allegations.

Yet in his brief and argument in the lower court counsel did not hesitate to go outside of his petition and present in support of contentions made by him, and not found in the petition, documents which were offered in the negotiations leading up to the signing of the treaty of Paris. Furthermore, he offered correspondence of a member of the commission written subsequent to the signing of that treaty. (Letter Mr. Wm. R. Day to Hon. D. T. Watson, Oct. 4, 1899, p. 46, app's brief.) Apparently guided by the action of counsel, the learned judge of the lower court, in drafting his opinion, also considered matters not set forth in said petition, and incorporated some of these extraneous things in his opinion.

In his brief filed in this court, counsel has again left the confines of his petition and offered data and

based argument thereon in order, as it seems to us, to supply that which was lacking in his petition, and thus assist him to state a cause of action and come within the jurisdiction of the Court of Claims.

With the foregoing explanation we now turn to the statement of the case.

STATEMENT OF THE CASE.

On the 10th day of December, 1898, by a treaty executed at Paris, France, and subsequently signed by the President of the United States, with the approval of the Senate, the Government of Spain ceded *unconditional* sovereignty over the Philippine Islands to the United States. The language of the cession in Article III of the treaty is as follows:

> Spain *cedes* to the United States the archipelago known as the Philippine Islands * * *.
>
> The United States will pay to Spain the sum of twenty million dollars ($20,000,000) within three months after the exchange of the ratifications of the present treaty.

Now, previous to the transfer of this *unconditional* sovereignty and on, to wit, April 14, 1897, the Government of Spain granted a concessional contract to the Eastern Extension Australasia & China Telegraph Company, Limited, appellant, in consideration of the appellant constructing and maintaining a submarine cable and telegraph line from points on the following islands of the Philippines, to wit, from Luzon to Panay, from Panay to Negros, and from Negros to Cebu. Appellant completed

the cable and telegraph lines ready for traffic in October of 1897, and has ever since *owned*, *operated*, and *maintained* them. At no time has the United States *owned*, *operated*, or *maintained* said cable-telegraph system.

The interesting points which suggest themselves in this concessional contract are:

First. That it covers a period of 20 years.

Second. That the Spanish Government was to have all Government messages sent at half rates.

Third. That Spain was to pay an annual subsidy to the appellant company of £4,500 sterling during the life of the concession.

Fourth. That it is inferentially an exclusive and, therefore, a monopolistic concession.

Fifth. That the concession was a *personal* contract, which the *General* Government of Spain, a monarchical form of government, entered into with appellant; and was granted for the benefit of Spain.

Sixth. That the concession shows a continuing personal obligation, and does not show that the consent of the people of the Philippine Islands, or their representatives, was asked in creating this debt, nor was consent given by the people of the Philippine Islands, or their representatives.

It appears from the concession that the same will run until October, 1917, so that while appellant in this action is asking for a judgment of $109,462.50, being subsidy installments for the years 1905, 1906, 1907, 1908, and 1909, together with interest thereon, yet, if appellant's view prevails in this case, the

United States will no doubt be liable for the payment of the subsidy to the appellant from the year 1909 to the year 1917.

In the process of negotiating this treaty, the following are some of the incidents that occurred between the commissioners representing the United States and those representing Spain. After a great deal of discussion and offering of protocols from one side to the other, E. Montero Rios, the president of the Spanish commissioners, on November 22, 1898, addressed a letter to Mr. William R. Day (Annex 1 to protocol 16, S. Doc. No. 62, pt. 1, p. 216), calling for a special answer regarding the assuming of the colonial obligations of Spain by the United States, as follows:

> First. Is the proposition you make based on the Spanish colonies being transferred *free of all burdens, all, absolutely all, outstanding obligations and debts, of whatsoever kind* and whatever may have been their origin and purpose, remaining thereby chargeable exclusively to Spain?

To this letter Mr. William R. Day, president of the American commission, made the following reply (Annex 2, protocol 16):

> In this relation I desire to recall the statements in which the *American commissioners* have in our conferences *repeatedly declared that they would not accept any articles that required the United States to assume the so-called colonial debts of Spain.*
>
> *To these statements I have nothing to add.*

> But in respect of the Philippines the American commissioners, while including the cession of the archipelago in the article in which Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the island of Guam in the Ladrones," or in an article expressed in similar words, will agree that their Government shall pay to Spain the sum of twenty million dollars ($20,000,000.)

Still not satisfied with the reply of the American commissioners, the Spanish commissioners again addressed the American commissioners on this same subject in the following article (S. Doc. No. 62, pt. 1, p. 240):

> Contracts formally entered into by the Spanish Government or its authorities for the public service of the islands of Cuba and Porto Rico, the Philippines, and others ceded by this treaty, and which contracts are still unperformed, shall continue in force until their expiration pursuant to the terms thereof. Such contracts as also cover the service peculiar to Spain or any of her other colonies, the new Government of the above-mentioned islands shall not be called upon to carry out, save only in so far as the terms of said contracts relate to the particular service or treasury of such islands. The new government will therefore, as regards the said contracts, be holden to all the rights and obligations therein attaching to the Spanish Government.

> List of pending contracts for public works and services. * * *
>
> *Cable contract, Manila to Hongkong, with another English company ("The Eastern").*

On December 1, 1898, the president of the American commissioners made the following statement in reply to the article presented by the Spanish commissioners:

> The president of the American commission stated that the American commissioners were constrained to reject these articles. The United States did not propose to repudiate any contract found upon investigation to be binding under international law, but no such clauses as now proposed had been inserted in treaties heretofore made by the United States with Spain, France, Mexico, and Russia for the acquisition of territory, and it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of international law.

The reply of the president of the American commission and all of the negotiations leading up to his reply were thoroughly understood by the Spanish commissioners, as is evidenced by the annex to protocol No. 21, as drafted by Emilio De Ojeda, found on page 258 of Senate Document No. 62, part 1, as follows:

> *It refuses also to stipulate anything in relation to the respect due the contracts entered into by a legitimate sovereign for public works and services*—contracts which materially affect the

rights of property of private individuals—which were respected in the treaties of Campo Formio of 1797, of Paris of 1814, of Zurich of 1859, of Paris of 1860, of Vienna of 1864 and 1866, and which Germany respected also when ending the war with France by the treaty of Frankfort of 1871. The American commission alleged as its only reason for this refusal that the United States in its treaties has never recognized these contracts.

When the treaty was finally drafted, Article III, hereinbefore quoted, was incorporated in the treaty without one word being said about the assuming of any of Spain's obligations in the Philippine Islands by the United States.

The treaty, together with all the clauses and protocols herein referred to, was presented to the President and Senate of the United States, and the same was ratified by the President with the consent of the Senate.

ABSTRACT OF PETITION.

The petition contains, briefly, the following:

(3) That Spain granted a concession to appellant on April 14, 1897, to construct, establish, and work three submarine telegraph cables in the Philippine Archipelago under the terms of the concession annexed to the petition and marked "Schedule B."

(5) That appellant, pursuant to the concession, completed the cables ready for traffic in October, 1897, and has ever since maintained and operated them.

(6) Appellant has at all times fulfilled the terms of said concession.

(7) Prior to December 10, 1898, Spain held absolute sovereignty over the Philippine Islands. On that day, at Paris, a treaty was duly entered into between the Government of Spain and the United States, whereby the Government of Spain ceded the Philippine Archipelago to the United States on the payment by the United States to Spain of twenty million dollars ($20,000,000); pursuant to said cession the United States of America acquired title to and jurisdiction over said Philippine Islands and over the islands of Luzon, Panay, Negros, and Cebu and the full right of sovereignty over said islands and all of the rights and obligations of Spain with respect thereto ceased.

(8) That thereupon the United States took possession and assumed the said sovereignty * * * and availed itself of all the benefits and advantages of the submarine cable and telegraph lines and used them.

(9) "*By reason of the premises the United States of America assumed all the obligations and the performance of all the conditions accepted by the Government of Spain and agreed to by it, according to the terms of its aforesaid concessions and of each of them, and agreed with the claimant to perform the covenants and agreements and to fulfill the conditions set forth in said several concessions, and accepted and agreed to by the Government of Spain.*"

(10) That the United States has failed to pay the subsidy for the years 1905, 1906, 1907, 1908, and 1909.

With this abstract of the petition before us, we shall now proceed to test its allegations by the demurrer.

THE DEMURRER.

OUTLINE OF ARGUMENT OF DEMURRER.

We propose to present the two grounds urged in the Court of Claims in the inverse order from that in which they were presented in the lower court, as follows:

I.

That the petition does not disclose a cause of action within the jurisdiction of this court.

II.

That the petition does not state facts sufficient to constitute a cause of action against the United States.

We shall treat the above subjects I and II under the following division of argument:

I.

THAT THE PETITION DOES NOT DISCLOSE A CAUSE OF ACTION WITHIN THE JURISDICTION OF THIS COURT.

FIRST.

A history of the jurisdiction of the Court of Claims in regard to claims growing out of or dependent upon treaties.

SECOND.

The action of Congress respecting the jurisdiction of the Court of Claims in regard to claims growing out of or dependent upon treaties.

THIRD.

The test of the Supreme Court of the United States in respect to the jurisdiction of claims growing out of or dependent upon treaties.

FOURTH.

Comparison of Tucker Act with section 1066, R. S., showing no conflict between the two.

FIFTH.

Section 1066, R. S., special legislation; the Tucker Act general legislation; the latter, being subsequent to the enactment of the former, does not repeal.

II.

THE PETITION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

FIRST.

Eliminating the conclusion of law pleaded in the petition, there is no cause of action set forth.

SECOND.

The treaty being silent about the assuming of the obligation, defendant is not bound to pay same under the laws of nations or international law.

THIRD.

The nature of the obligation between Spain and appellant.

FOURTH.

The United States refused to pay the obligations of appellant, and Spain understood this.

I.

THAT THE PETITION DOES NOT DISCLOSE A CAUSE OF ACTION WITHIN THE JURISDICTION OF THIS COURT.

FIRST.

A history of the Court of Claims in regard to claims growing out of or dependent upon treaties.

Our proposition is that, admitting only for the purpose of argument, that any claim is alleged in the petition against the United States, then it is one growing out of a treaty. We contend, however, that section 1066 R. S., prohibiting the jurisdiction of the lower court in respect to claims growing out of treaties has never been repealed.

It is our belief that a study of the history of the jurisdiction of the Court of Claims, or, to be more particular, the limitation of jurisdiction of the court upon this subject, together with a study of the understanding of Congress and the views of the Supreme Court in cases where it has arisen, will be of great assistance. We therefore go back to the act of 1855 creating the Court of Claims (chap. 122, p. 610, vol. 10, U. S. Stat. L.), where we find that this court is given power to—

> hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, etc., etc.

This jurisdiction of 1855 was later enlarged in 1863 by amending the act of 1855 (chap. 92, p. 756, vol. 12, U. S. Stat. L.), so that—

> said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government against any person making claim against the Government in said court.

So far, then, there is no mention of the Court of Claims having jurisdiction of claims growing out of or dependent upon treaty stipulations entered into with foreign nations. But in this same act of 1863 Congress inserted a section, which has since been designated under the Revised Statutes as section 1066 of the Revised Statutes. We shall hereafter refer to it as section 1066, R. S.

This section is as follows:

> The jurisdiction of the said court shall not extend to any claim against the Government * * * growing out of or dependent on any treaty stipulation entered into with foreign nations. * * *

The gist of our argument at this time centers on the question of whether section 1066, R. S., has been repealed, either expressly or impliedly. It is the contention of counsel for appellant that certain parts of the act of 1887, commonly known as the Tucker

Act (24 Stat. L., 505), repealed section 1066, R. S. In his brief, on page 24, he says:

> There was a manifest inconsistency between that act and section 1066 of the United States Revised Statutes, and the latter must therefore be deemed to have been superseded by the former.

Appellant has quoted many cases in support of his contention which we do not admit are authority for that contention, and in arguing regarding the inconsistency which he alleges exists he has stated a conclusion to which we are unable to assent.

The part of the Tucker Act which it is urged repealed section 1066, R. S., is found in the italicized words set forth in the following section (sec. 1, ch. 359, p. 505, vol. 24, U. S. Stat. L.):

> All claims founded upon the Constitution of the United States or any law of Congress * * * or upon any regulation of an executive department, *or upon any contract, expressed or implied, with the Government of the United States*, or for damages, liquidated or unliquidated, in cases not sounding in tort, *in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable.*

And the repealing section, which is as follows (sec. 16):

> That all laws and parts of laws inconsistent with this act are hereby repealed.

In 1911, Congress codified the laws of the judiciary in an act entitled "An act *to codify, revise, and amend* the laws relating to the judiciary," approved March 3, 1911. A study of this law seems to us to shatter the position taken by appellant.

SECOND.

The action of Congress respecting the jurisdiction of the Court of Claims in regard to claims growing out of or dependent upon treaties.

It is well to note by way of preface that the Judicial Code of 1911, as it has been designated, contains not only section 1066, R. S., but also that section of the Tucker Act hereinbefore quoted, which, it is asserted, is in conflict with section 1066. *If there was a repugnancy* or conflict between the two sections *in 1887*, when the Tucker Act was passed, then *that repugnancy* or conflict *must have existed at the time of the passage of the Judicial Code in 1911*, and at all other times. And this being true, Congress ought not to have included in the Judicial Code the two sections said to be in conflict. However, Congress in the year 1911 evidently did not think that there was a conflict between the two sections heretofore quoted, and appellant practically concedes that Congress held this view in 1911, on page 39 of its brief, but it argues on the same page that because

Congress did not think so in 1911 does not avail us anything, for there is an hiatus between the year 1887, when the Tucker Act was passed, and the year 1911, when the Judicial Code was adopted, in which the views of Congress are silent.

It is further contended that the action in the case at bar was begun a year previous to 1911, and that appellant's case should be governed by the law in existence when the court's jurisdiction was invoked.

Our answer to this last contention is that the history of the passage of the Judicial Code absolutely refutes it.

We learn from House Document No. 783 (pt. 1, 61st Cong., 2d sess.) that a committee appointed by this Congress to revise and codify the judiciary laws submitted a report which gives light on this question. This committee, in drafting said report, took up each section of all the preceding acts of Congress relating to the jurisdiction and procedure of the Court of Claims, and reported under each section whether the same was "*existing law and no change whatever*" had been made, or if not existing law, then in what respect the same had been changed. On page 66 of said report, in commenting on section 158 of the bill as presented to Congress by this commission (section 158 being practically the same as section 1066, R. S., and the same as section 153 of the Judicial Code of 1911), the committee reported as follows:

> Section 158: *Existing law*, the only change being in the use of the word "first" for the word "one."

The *report* of the committee *was approved by Congress*, and the bill as presented by it, with the exception of a change in the number of the section from 158 to 153, was passed, and thus section 1066, R. S., became section 153 of the Judicial Code. What, then, is the effect of the committee's report that section 158 (being sec. 1066), was existing law previous to the passage of the Judicial Code, particularly in view of the fact that the records show that Congress adopted the committee's report and passed the bill as recommended by the committee with one or two minor exceptions not important here. The answer must be that Congress believed that previous to 1911, and, therefore, at all times since the enactment of section 1066, R. S., that the same had been existing law. Thus the period of time when the jurisdiction of the Court of Claims was invoked by appellant is covered by this report of the committee of Congress, and furthermore, Congress thought that section 1066 had been alive at all times since its enactment.

But if congressional history reveals the fact that the Court of Claims did not have jurisdiction over claims growing out of or dependent upon treaties, even more so do the rulings of the Supreme Court sustain this view.

THIRD.

The test of the Supreme Court of the United States in respect to the jurisdiction of claims growing out of or dependent upon treaties.

It is our purpose to analyze section 1066, R. S., in the light of cases passed on by the Supreme Court.

The first query that presents itself is, What is meant by "claims growing out of or dependent upon treaty stipulations with foreign nations"?

In the case of *Ex Parte Atocha* (17 Wall., 439), Mr. Justice Field, writing the opinion, said, on page 444, that:

> Those acts [meaning the act of 1863 and those previous to it] have since then applied only to claims made *directly* against the United States, and for the payment of which they were *primarily* liable, if liable at all, and not to *claims against other Governments, the payment of which the United States had assumed or might assume by treaty.*

Here, then, the Supreme Court says that since the passage of section 1066, R. S., the Court of Claims only has jurisdiction over claims where the United States was a direct party and on which it was primarily liable, and not over the claim of an individual against a foreign Government assumed by the United States by treaty.

In the case of *The Great Western Insurance Company* v. *The United States* (112 U. S., 192), Mr.

Justice Miller, on page 199, laid down an additional rule that jurisdiction over—

> treaty stipulations * * * is conferred by special act,

And—

> the authority of that court to hear and determine them is limited and controlled by the provisions of that act.

Again, in the case of *The United States* v. *Kingsley* (37 U. S., 476, 484), we are told that in construing a case arising under a treaty with Spain, whereby Florida was ceded to the United States, that the Supreme Court, interpreting an article of this treaty, held—

> * * * that the United States must maintain the rights of property under it by applying *the laws and customs by which those rights were secured* before Florida was ceded, or by which an inchoate right of property would, by laws and customs, have been adjudicated by Spanish authority, to have become a perfect right; by applying, in the first instance, in such cases, as was said in *Arredondo's case*, the principles of justice, according to the rules of equity; and in the second, all those laws and customs decisive of a right of property, whilst the party claiming the right was a subject of Spain.

And also—

> It (the court) has not, nor will it, apply, in the construction of such conditions in such cases, the rules of the *common law*.

Speaking of the law of nations in the case of *Thirty Hogsheads of Sugar* v. *Boyle* (9 Cranch, 191–198), Chief Justice Marshall says on page 197:

> * * * This law is in part unwritten, and in part conventional. *To ascertain that which is unwritten*, we resort to the great principles of reason and justice; but as these principles will be differently understood by different nations, under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. *The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.*

In Moore's International Law Digest (vol. 1, p. 2, par. 2), on this same subject, the writer says:

> * * * In such cases an appeal is made to the authority of writers; to the provisions of treaties disclosing a consensus of opinion; to the laws and decrees of individual States regulating international conduct; to the decisions of international tribunals, such as boards of arbitration; and to the judgments of prize courts, and of ordinary municipal courts, purporting to be declaratory of the law of nations.

Summarizing the first two cases, we find that the Court of Claims has no jurisdiction of claims where the United States is not a direct party or primarily liable, or claims against other governments which the United States had assumed by treaty. Furthermore we learn, according to the other cases and authorities quoted, that jurisdiction where there is a treaty in-

volved is conferred by special act, and the authority of the court to hear and determine the stipulations of the treaty is limited and controlled by the provisions of the act granting such jurisdiction; that in questions growing out of a treaty we shall give *respect to the common law, but not be governed by it;* that we shall be influenced by the laws and decrees of individual States regulating international conduct, such as the decisions of international tribunals, the judgments of prize courts, etc. Let us then compare claims growing out of treaties with claims founded upon contracts express or implied.

FOURTH.

Comparison of the Tucker Act with section 1066, Revised Statutes, showing no conflict between the two.

What is meant by section 1 of the Tucker Act, which is as follows:

> *All claims founded upon* * * * *any contract, expressed or implied,* with the Government of the United States * * * in respect of which claims the party would be entitled to redress against the United States, either *in a court of law, equity, or admiralty* if the United States were suable.

If we read the entire section correctly and with an eye to the punctuation, does it not mean that the Court of Claims shall have jurisdiction of all claims founded upon—

(1) A contract, expressed or implied,

(2) With the United States in

(3) A court of *law* or a court of *equity* or a court of *admiralty*.

One thing seems certain, whether a claim be brought in any one of these three courts it must be founded upon a contract, expressed or implied.

Now, it is our understanding of an action founded upon a contract, expressed or implied, that we determine whether it is such according to the laws adopted by Congress, and that, in adjudicating such a claim, the courts take cognizance of the common law and statutory law of this country.

We do not understand that the jurisdiction of the court in a contract, expressed or implied, would depend upon a special act of Congress, and that the jurisdiction in such a case would be limited to the act conferring jurisdiction.

So it seems to us that in determining as to whether a claim growing out of or dependent upon a treaty comes within the jurisdiction of this court, the tests are so dissimilar from those required in determining whether the court has jurisdiction over claims founded upon a contract, expressed or implied, that there can be no conflict whatsoever.

Apropos of its theory of conflict, counsel for appellant in his brief (pp. 40–45) attempts to distinguish between the three cases, *The Great Western Insurance Company* v. *The United States* (112 U. S., 193), *Ex Parte Atocha* (17 Wall., 439), and *Alling* v. *The United States* (114 U. S., 562), all of which were handed down previous to the passage of the Tucker Act of 1887, and the case of *The United States* v. *Weld*

(127 U. S., 51), which arose after the passage of the Tucker Act. It is admitted by him that the first three cases referred to came within the terms of section 1066, R. S., and are authority for our contention that the Court of Claims did not have jurisdiction of the claims therein because the claims in all of these cases *grew out of a treaty*. But he argues that they are not authority against his contention in the case at bar, for the reason that the Tucker Act had repealed section 1066, R. S., when his client invoked the court's jurisdiction, and thus the Court of Claims had then jurisdiction over claims growing out of treaties. Aside from the fact that the history of the passage of the Tucker Act in 1887 in Congress, as set out hereinbefore by us, nullifies his theory that section 1066 was repealed, and that, therefore, all of the first three cases although having once been authority, are no longer so in regard to claims growing out of treaties, yet these three cases are also distinguishable from the case of *United States* v. *Weld* (127 U. S., 51) on another ground, i. e., that the claim in the latter case *does not grow out of a treaty*. For it was not charged in the latter case that the United States was directly or primarily liable on the claim, but it was charged that the claim therein alleged depended upon a *statutory provision* of Congress. The distinction is clearly made in the opinion of Mr. Justice Lamar, where he says:

> * * * We are of opinion, however, that a very broad distinction exists between those cases and this one. In the first case cited, by

the allegations of the petition itself, the claim was declared to grow directly out of the treaty and was thus clearly dependent upon it. *The petition based the right of recovery on the provisions of the treaty itself. No statute was invoked, nor was it charged that the United States was directly and primarily liable on the claim.* In the language of the court below, which we approve: "In that case the claimant corporation was not seeking to recover under any law of Congress, but was attempting to enforce an alleged implied assumpsit on the part of the United States, growing out of and dependent upon the treaty of Washington, notwithstanding the laws of Congress, which expressly excluded its claim from consideration and from payment out of the fund in controversy. Instead of founding its claim on any law of Congress, as do the present claimants, the company invoked the jurisdiction of this court to set aside and annul the statute provisions."

FIFTH.

Section 1066, R. S., is special legislation; the Tucker Act is general legislation; the latter being subsequent to the former does not repeal section 1066, R. S.

Section 1066 is legislation on a special subject. The rest of the act of 1863, in which section 1066 was originally incorporated, deals with the *affirmative general jurisdiction* of the court by increasing the jurisdiction

given the court by the act of 1855. Furthermore, jurisdiction is extended in respect to questions arising under a contract, expressed or implied, or for damages, liquidated or unliquidated, and not sounding in tort. But section 1066 deals with a peculiar special kind of legal jurisprudence, if it can thus be termed, i. e., claims growing out of a treaty. Furthermore, this section is a *limitation and express denial of the jurisdiction* of the court, whereas the rest of the act, except that part dealing with the statute of limitations, in so far as the jurisdictional part is concerned, *is affirmative*.

We take it that the usual rule of construction is that—

> Where there are two statutes, the earlier special and the later general (the terms of the general being broad enough to include the matter provided for in the special), the fact that the one is special and the other is general creates the presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. (*Rodgers* v. *United States*, 185 U. S., 83, syllabus.)

We quote in addition to this from other authorities as follows:

> A later act would not be held to qualify or repeal a prior one, unless there were a positive repugnancy between the provisions of the

new law and the old, and even then the prior law is only repealed to the extent of such repugnancy. (*U. S.* v. *Mathews*, 173 U. S., 388.)

And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. (*U. S.* v. *Healey*, 160 U. S., 147.)

If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be. (*S. C.* v. *Stoll*, 17 Wall., 431.)

The settled rule of statutory construction is that general legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes; and general provisions must be interpreted so as to embrace only cases to which the special provisions are not applicable. (*Magone, Collector*, v. *King, et al.*, 51 Fed. Rep., 526, and cases cited.)

So then section 1066, R. S., being a limitation of the jurisdiction of the court upon a special subject, and the Tucker Act of 1887 being an extension of the court's general jurisdiction, and subsequent to the passage of section 1066, R. S., it would appear from the rule of construction of the Supreme Court that section 1066, R. S., is not repealed by the Tucker Act.

II.

THE PETITION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

As a preface to the present discussion we say, with the learned judge of the Court of Claims, that the lower court does not have jurisdiction of actions arising directly out of international law. We shall not pursue this subject further except indirectly, first, because it seems to us too self-evident to need further discussion, and, second, because appellant, though contending that it has a claim arising directly out of international law, does not in its brief argue with any conviction or support of authorities in point that the lower court has such jurisdiction, but merely assumes that it has.

So again predicating our argument on the assumption that appellant attempted to set forth a cause of action based on a claim growing out of a treaty, nevertheless we hold that the petition does not state a cause of action of any kind or nature whatsoever for the following reasons:

FIRST.

Eliminating the conclusions of law pleaded in the petition, there is no cause of action set forth.

We call particular attention to the conclusions found on page 6, paragraph 9, of appellant's brief, for the reason that the same seems to include all other conclusions previously pleaded, which is as follows:

> *By reason of the premises, the United States of America assumed all the obligations and the*

> *performance of all of the conditions accepted by the Government of Spain and agreed to by it,* according to the terms of its aforesaid concessions and of each of them, *and agreed with the claimant* to perform the covenants and agreements and *to fulfill the conditions set forth in said several concessions, and accepted and agreed to by the Government of Spain.*

We suggest that the conclusion in these lines is one drawn by the pleader himself, and, being a pleader's conclusion, would not add any strength to the petition, even if true. But we assert that the conclusion is not true, for the treaty is wholly silent about the United States assuming or agreeing to pay all or any of the obligations of Spain, and we are only bound by the terms of the treaty.

(*a*)

In order to prove the assertion that the conclusion is simply one of the pleader and not borne out by facts in the petition, we shall now examine that part of the petition preceding paragraph 9, wherein the allegations are set forth from which appellant draws the inferences stated in its conclusions. In substance it says that Spain owned the Philippine Islands and granted a concession to claimant; that Spain transferred the sovereignty and control over the islands to the United States by a treaty; that the United States assumed the sovereignty and control of the islands and over all the property and property rights and availed itself of the benefits and advantages of

the submarine cable and telegraph lines established, constructed, and operated by appellant.

Is there any allegation here that Spain was the owner of the submarine cable and telegraph lines? On the contrary, the concession set forth in schedule B and the petition itself, sections 4 and 5, show ownership in appellant.

(*b*)

Is there anything in the petition which shows that Spain had the right to transfer to the United States any of the obligations in the concession, without the consent of the appellant, and that appellant did consent? On the contrary, the concession (schedule B) shows that the contract was a personal one between Spain and the appellant, and there is nothing which shows Spain's right to transfer the subsidy obligation to the United States.

(*c*)

Is there any allegation in the petition showing that Spain did transfer to the United States the obligation covered by schedule B? The only source for the answer to this question must be found in the petition, and by the terms of the petition we are referred to the treaty, but the treaty is silent on this question.

(*d*)

Is there any allegation that the treaty specified the transfer of the obligation in schedule B by Spain to the United States, and the assumption of the obligation by the United States? The answer here is obviously in the negative.

If, then, the petition fails to allege—

(*a*) That Spain was the owner of the cables; or

(*b*) Had the right to transfer the obligation and claimant consented to the transfer; or

(*c*) That Spain did transfer the obligation and that the United States accepted the transfer; or

(*d*) That the treaty specified that the United States assumed the obligation.

On what facts, then, we ask, does the pleader base the conclusion that—

> the United States * * * agreed with the claimant to perform the covenants and agreements and to fulfill the conditions set forth in said several concessions, and * * *

This conclusion of the pleader is the very corner stone of the case which he has attempted to build up in his petition. But how is it to be held in its place without the necessary supporting allegations? If it be not supported by them, then according to the frequent rulings of this court it adds nothing to the petition, because it stands as a conclusion of law unsupported by allegations of fact.

It is then our first contention that, eliminating the conclusion of law hereinbefore set forth, the petition does not state a cause of action.

SECOND.

The treaty being silent about the assuming of the obligation, defendant is not bound to pay the same under the laws of nations or international law.

On page 45 of its brief, appellant raises this question in the following language:

> *Our claim is based upon those considerations of international law which have been stated with great clearness in the decisions of this court by approved text writers and jurists and in various State papers, cited under Point III.*

However, on page 15 of its brief appellant bases its claim on what seems to us to be a totally different ground, in the following language:

> *The appellee incurred liability on a contract, express or implied.*

Examining these two claims with the one set forth in the petition, i. e., a claim growing out of a treaty, it appears to us that appellant has changed its own views of the case three times. First, according to the evident intent of the pleader, there was an attempt in the petition to set up a claim growing out of and dependent upon a treaty. Second, the claim (p. 45 of appellant's brief) was founded upon—

> those considerations of international law which have been stated with great clearness in the decisions of this court. * * *

And, third (p. 15 of appellant's brief) —

> the appellee incurred liability on a contract, express or implied.

So far as we are able to analyze these three sources from which appellant's claim is said at different times to have come, it is our view that none of them is tenable, for the following reasons:

(1) A treaty is a contract between nations; the binding force of that contract coming from the consent of the nations, their intention is determined by the terms of the treaty, whereas —

(2) A contract, express or implied, such as is referred to in the Tucker Act, is a contract whose force is derived from the laws adopted by the people of a single nation, such as the United States, and the law applied to the interpretation of the contract is the common law and statutory law adopted by our country; while on the other hand—

(3) Claims growing out of international law differ from either of the other forms of claims, because they are not limited by the terms of a treaty necessarily, nor the common law, nor statutory law of the United States. The authorities hold that the common law, in claims arising out of international law, may simply be given consideration, but shall not necessarily be binding. Furthermore, claims growing out of international law acquire their force and interpretation from those rules by which a nation consents to abide when it enters into the intercourse of civilized nations; such rules being drawn

from the customs of the high seas, the decisions of prize courts, etc. This matter is well set forth in Moore's International Law Digest (vol. 1, p. 402), as follows:

> The fact that in certain treaties of cession contracts, regularly entered into for objects of public interest specially concerning the ceded territory, are taken over by the new sovereignty, can not be accepted as proving that without treaties all such contracts become obligatory upon the acquiring sovereignty. The stipulations of treaties are sometimes confirmatory of the law of nations, sometimes different from it. Presumably they should be regarded as not identical with it, since nations may well be presumed not to make unnecessary stipulations or fail to obey the law of nations.
>
> Calvo (sec. 101) does not seem to regard such treaties as mere repetitions of the law of nations; and Hall (sec. 27, note) reminds us of the motives of policy which govern the making of these as of other treaties. The stipulations are no doubt the result of the existence of general principles of the law of nations concerning debts and contracts as affecting an acquiring sovereignty; but those principles may well fall short of the proposition that all executory contracts by the central government for imperial rights and privileges, as well as local benefits, become obligatory as such contracts in all their terms upon the victorious sovereign acquiring the locality.

Having already subjected the petition to a test as to whether the claim herein made arises out of a treaty or upon a contract, express or implied, we shall now subject it to a test as to whether the claim made in the petition obligated the appellee to assume and pay the obligation under the rules of international law. The question then arises what are the rules of international law? Speaking of international law, Mr. John Bassett Moore in his book entitled "Moore's International Law Digest" (vol. 1, p. 2) said:

> Though on many subjects the rules of international law are clear and precise, yet, as often happens with municipal law, the rule applicable to a particular case may be uncertain and difficult of ascertainment. In such cases an appeal is made to the authority of writers; to the provisions of treaties disclosing a consensus of opinion; to the laws and decrees of individual States regulating international conduct; to the decisions of international tribunals, such as boards of arbitration; and to the judgments of prize courts and of ordinary municipal courts purporting to be declaratory of the law of nations.

And Mr. Chief Justice Marshall in the case of *Thirty Hogsheads of Sugar* v. *Boyle* (9 Cranch, 191, 198) said:

> The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights which are recognized by all civilized and commercial States throughout Europe and America. This law is

> in part unwritten and in part conventional. To ascertain that which is unwritten we resort to the great principles of reason and justice; but as these principles will be differently understood by different nations under different circumstances, we consider them as being in some degree fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received not as authority but with respect. The decisions of the courts of every country show how the law of nations in the given case is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Keeping in mind the definitions laid down by the two great authorities heretofore quoted from, we propose to analyze the nature of the obligation between Spain and appellant, which, it is claimed, the United States has assumed, under the following heads:

THIRD.

The nature of the obligation between Spain and appellant.

(*a*) Spain was a military monarchy; the people of the Philippine Islands were not represented in the making of the contract, nor was their consent asked or given.

(*b*) The contract was a *personal* one between Spain and appellant for the *general* benefit of Spain.

(*c*) An unsecured obligation.

(*d*) Spain could not limit the sovereignty of the United States over the Philippine Islands except by treaty.

(*a*)

Spain was a military monarchy, etc.

The Spanish Government was a monarchial form of government, and we here suggest that this court take judicial notice that it was also a military monarchy at the time this concession was made to appellant, in so far as the Philippine Islands were concerned. It is an historical fact that in 1896 the Aguinaldo insurrection had started, and that it was not suppressed in 1897. The purpose of Spain in granting the concession is apparent when we note that it consisted of the right to control the use of the cable lines and the right to censor messages and to take over the management of the cable lines under certain conditions.

We submit that it is a fair inference that Spain granted the concession in order to have a better means of controlling the islands. There is nothing in schedule B that indicates that the cable and telegraph lines were constructed for the profit and benefit of the people of the Philippine Islands. The

Government of Spain was to have its messages sent at half rates, but not so with the people of the Philippine Islands. Whatever benefit the people of the Philippine Islands derived from the use of the cable and telegraph lines, if any, was incidental to the purpose for which the cables were laid.

In discussing such a situation, a writer in Moore's International Law Digest (vol. 1, p. 402) says:

> As I have suggested, these concessions, made by a military monarchy for cables and railroads through its colonies, were by no means entered into without regard to the benefit and convenience of the central government as sovereign over the colonies. They were, and this appears upon their face, concerning instruments with which the monarchy was to govern more easily and conveniently the subject colonies for the general benefit of Spain as well as their own.
>
> To regard them as exclusively for local benefit would, therefore, be to ignore obvious facts.

In arguing that the cable system was for the benefit of the people of the islands, appellant, on pages 51 and 52 of its brief, states the following:

> The claimant, in conformity with all of the conditions imposed upon it, *created for the Philippine Islands instrumentalities of government and commerce, for such these cables concededly are.*
>
> (*b*) These instrumentalities of government and of commerce provided by the claimant, at

> its expense, related solely to the Philippine Islands, as a colonial possession, *and were for their benefit and advantage, and not for the general purposes and advantages of the Spanish Government as the parent State.*

But we submit that the allegations in the italicized lines are not supported by any allegations in the petition, and are a mere claim on the part of appellant.

(*b*)

The contract was a personal one between Spain and appellant, etc.

The contract between Spain and appellant was a personal one. By this we mean that the parties to the contract were personally liable to each other to do their several parts. Spain and appellant could contract like two individuals, and they did so in this instance. We take our authority for stating that a State can contract and bind itself just as an individual, and will be considered as an individual, where the contract is brought into question in court, from a case quoted by appellant on page 71 of its brief, i. e., *People* v. *Stephens* (71 N. Y., 549), which holds as follows:

> The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for

> the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor.

In Hall's International Law (4th ed., p. 99) he says:

> The fact remains that the general debt of a State is a personal obligation. The case also of the creation of a new State out of part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one State to another. When the latter occurs, at least as the result of conquest, it is not usual to take over any part of the general debt of the State ceding territory.

(*c*)

It is an unsecured debt.

We mention this because while we do not conceed that a nation taking over the sovereignty over a territory from another nation is bound to pay any of the

obligations of the former sovereign not covered by treaty, yet, nevertheless, there are some instances where the claims upon the good will and grace of the grantee sovereign, as, for example, a secured debt, would suggest the payment of obligations incurred during the control by the former nation. Such is the case where money has been advanced for the benefit of a particular locality or improvements made thereon and that particular territory which is the recipient of the money or the improvements is encumbered with a lien for the payment of the sum advanced or the improvements made. This, however, is not the case at all in the claim made by appellant, for it is one which was assumed by the General Government of Spain for the benefit of the General Government. The islands of the Philippines were not encumbered by any lien whatsoever, nor was there any mortgage given or bonds assumed for the payment of the subsidy.

Summarizing, then, the contentions made by us in (*a*), (*b*), and (*c*), we submit that Spain at the time of the incurring of the obligation was a military monarchy and contracted the debt for the benefit of Spain in general, and not by or with the consent of the people of the Philippine Islands, or for their benefit; that the contract between Spain and appellant was a personal one, and that Spain is bound under this contract just as an individual would be; that the claim of appellant is an unsecured one, and, therefore, not a lien on the Philippine Islands or any part thereof.

How, then, could Spain, being a sovereignty which has not ceased to exist, and, therefore, being the same as a person bound upon a contract, escape the personal liability on this contract unless the United States agreed in writing to take it over? Appellant's reply is that we did agree by the rules of international law. How, when, and where did we agree? The only contract we have any knowledge of with Spain is the treaty, which is silent. Appellant's answer is found partly in one statement in its brief on page 53, and is as follows:

> On the acquisition by the United States of sovereignty over the Philippine Islands, the claimant's private rights of property were in no manner affected by the change of sovereignty, and the rights vested in it, both contractual and otherwise, and executory as well as executed, remained enforceable in accordance with the principles of international law.

And partly in another statement in its brief, on page 59, which is as follows:

> Under the established doctrines of international law, where a part of the territory of one nation is annexed by cession or otherwise to the territory of another, the latter, by the act of annexation, becomes bound to fulfill all the obligations which pertained to the former in respect of the territory acquired and the property therein. It practically inherits the rights and obligations of the ceding state.

In support of its theory, as found on page 53, appellant quotes from Mr. Chief Justice Marshall in the case of *United States* v. *Percheman* (7 Pet., 51). The doctrine laid down in this case can not be disputed.

Mr. Chief Justice Marshall said:

> The King cedes that only which belongs to him; lands he had previously granted were not his to cede.

The foregoing quotation crystallizes the point in this case. Spain had given a certain contract for a right to appellant, which was a personal one. Spain through its monarch could cede only that which belonged to the Government. Rights which it had previously granted were not hers to cede. But appellant goes a step further on page 59 of its brief. What is the practical meaning of these words quoted from its brief? Is it not that appellant says that the United States must not only recognize the private property rights of those occupying the ceded territory so far as they are related to each other, and in so far as the former Government of Spain granted such property rights to individuals, but that the United States must go further and *assume, take over, and agree to pay any debts or obligations connected with such private rights.*

This doctrine is so astounding that we are led to at once examine the cases appellant cites as authority to see how they bear out its contentions. In the case of *Hilton* v. *Guyot* (159 U. S., 113) we find the facts to be that a citizen of France sued a citizen of the United States in the French courts and obtained

a judgment against the defendant. The French citizen then transferred his action to the United States and brought suit on the judgment obtained in France. The question was whether, under the circumstances and in the absence of a treaty or act of Congress, the judgment could be opened and reexamined upon its merits in the United States courts. Or, in other words, what force was to be given to a foreign judgment against a citizen of this country in our courts. How do the facts in such a case, by analogy or otherwise, support the contention of appellant that the United States is bound to assume and pay the personal obligation of Spain because Spain transferred the sovereignty over the Philippine Islands to the United States?

To our mind this case simply determined that the United States must respect the private rights of its citizens and aliens within its borders, and the question to be determined, so far as international law was concerned, was, What weight should be given in our courts to a judgment obtained in a foreign country against one of our citizens? Surely it is not authority for the contention made that the United States by the rules of international law must assume and pay a personal debt of Spain because Spain transferred the sovereignty over the Philippine Islands to the United States.

In the next case cited by appellant, i. e., *The Paquete Habana* (175 U. S., 677), the facts were that at the outbreak of war between Spain and the United

States two fishing smacks owned by Spanish subjects residing in Havana were on a fishing voyage off the coast of Cuba, sailing under the Spanish flag. Near Havana they were overtaken by the United States blockading squadron and were brought into port; at the time they were taken the crews did not know that war had been declared nor did they have any arms or ammunition on board. In port the boats and cargoes were condemned and sold by our officials as prizes of war.

The question in this case was, Were the vessels subject to capture by the United States, and, if not, was the United States liable to pay the claimants for the price of the vessels, the cargo of fish, and damages? In other words, was it the unlawful taking of private property by the United States? The court held that it was an unlawful taking, and the claimants were reimbursed.

But in the case at bar there is no claim in the petition or otherwise that the United States took any property from anyone, nor does appellant claim that property was taken. There is *no allegation that the United States owns* the cables or ever was the owner. On the contrary, we have asserted that the petition admits ownership, now and at all times past, in the claimant.

If the United States had taken the cable and telegraph lines away from appellant on the transfer of the sovereignty by Spain to the United States over the islands, and thereupon dispossessed appellant of its property and then pocketed the receipts from the

cable and telegraph lines, or sold the cable and telegraph lines and then held the money derived therefrom, there would be some similarity between *The Paquete Habana case* and the case at bar.

But we have never claimed title in the cable and telegraph lines, nor did we ever dispossess appellant of its property or sell the property and pocket the receipts. We have not derived one dollar in any way, shape, or form from this property. In fact, the Government is paying for every message which it sends and has at all times paid appellant for its messages.

Appellant in its brief has quoted from many eminent authorities, but with due respect to the acumen of counsel we are unable to see wherein they are in point.

To repeat his contention, as we understand it, the United States under the laws of international law is bound to pay a personal obligation of Spain, a nation still in existence, because Spain transferred a piece of territory to us, the people of which had no voice in creating the obligation, or ever assumed it, the obligation being a general one for the benefit of Spain and not for the benefit of the islands.

The authorities quoted from, however, treat of cases wherein the facts are entirely different. For example, some of them discuss the situation where a conquering nation completely wipes out the sovereignty of the other nation and destroys its entity, leaving the creditors of the defeated nation without any recourse. Such facts do not fit the case at bar,

for Spain as a nation still exists and still has contractual powers and can pay obligations; or

These authorities treat of cases where a conquering nation annexes a piece of territory belonging to the defeated nation; the annexed territory by the consent of its people has been the recipient of some public improvement, which was intended for the profit of the residents. Such facts will not fit the case at bar, however, for the profit was not for the people of the Philippine Islands, and the cables were not put there with their consent. As we have said, they were a vehicle by which Spain could better control the government of its islands. Spain received additional benefit by reason of the fact that it paid one-half rate for its messages.

Again, these authorities treat of cases where a nation has been split up into smaller parts and the parts become independent sovereignties. Previous to the division, obligations have been incurred by the general government for the benefit and with the consent of all. These debts are prorated among the separate sovereignties. It is only fair to the creditors that each smaller separate sovereignty should pay its pro rata share. Such facts, however, do not fit the case at bar; or

These authorities treat of cases where nations succeeded to the sovereignty over a territory ceded by another, to wit, as in the case where Spain ceded Florida to the United States. In claims arising under this cession the principle has been laid down

that the United States must respect the titles granted by Spain to the owners of land in the territory ceded, but this is not our case, for in the case at bar the demand is made that the United States shall not only respect the private rights of claimants and the title that Spain gave them, but that we must assume Spain's obligations; or,

Lastly, these authorities treat of a case such as was referred to on page 64 of appellant's brief, wherein quoting from Mr. Norman Bentwich on the Law of Private Property in War, it is said:

> In the terms of peace between England and the Boers, she covenanted to devote £3,000,000 to cover war losses, which included losses by requisition and seizure of property by the enemy State; or, in other words, contracts made by the conquered Government. But Mr. Chamberlain declared, in the House of Commons, that *this was "an act of grace, without admitting any liability."* Finally, there has come the declaration of the Divisional Court that "there is no principle of international law by which, after conquest, the conqueror becomes liable, in the absence of express stipulation to the contrary, to discharge the financial liabilities of the conquered State incurred before the outbreak of the war."

It might be pertinent at this point to recur to the fact that the *doctrine* laid down in the last quotation *is from* the *English courts*, and the *claimant* herein a *British corporation*.

(*d*)

Spain could not limit the sovereignty of the United States over the Philippines Island except by treaty.

This brings us to the question as to what is meant by sovereignty? For reply we quote from a famous Spanish writer, D. Delfin Donadin y Buignau, who says that it is—

> the right which a nation has of organizing the public powers in such a way as it may deem advisable.

In commenting upon this definition in annex to protocol No. 5 (p. 48, S. Doc. No. 62, pt. 1, 55th Cong., 3d sess.), which document was one of those passing between the American and Spanish commissioners in negotiating the treaty of Paris, the author, Mr. John Bassett Moore, says:

> National sovereignty, as defined by high Spanish authority, is "the right which a nation has of organizing the public powers in such a way as it may deem advisable." *This right, though it includes the power to contract obligations, is in no sense composed of them.* The thing done in the exercise of sovereignty is not a part of the sovereignty itself; the power to create is not the thing created. Nor is it possible to shut our eyes to the fact that in the Spanish memorandum the term obligations is used indiscriminately in respect of two different things, namely, the duties which a

> sovereign as such owes to his subjects, and the debts which he may specially contract in the exercise of his sovereign power for his own purposes.

It would seem from these two authorities that two propositions are clear, (1) that the obligations which a nation incurs are not a part of sovereignty, as counsel for appellant evidently believes, but that sovereignty once granted gives the grantee the power to incur obligations, and (2) that the transfer of sovereignty contemplates the complete and unlimited transfer of authority, and that complete and unlimited sovereignty is not transferred if loaded down with the obligations of the grantor.

Where are we to find, and how are we to determine, whether the sovereignty which the grantor passes to the grantee is free and unlimited? The answer is in the treaty. Yet the treaty in this case is silent about the assumption of any obligations by the United States or the transfer of any by Spain, as we see when in article 3 it states that "Spain *cedes* to the United States the Philippine Archipelago."

FOURTH.

The United States refused to pay the obligations of appellant and Spain understood this.

Under this heading we shall refer to the letters passing between the American and Spanish commissioners, and the articles as previously quoted in our *statement of fact* in this brief, but for the sake of brevity we will not requote them in full here.

In the letter from E. Montero Rios, president of the Spanish commissioners, to Mr. William R. Day, president of the American commissioners, dated November 22, 1898, the specific question is propounded in language that can not be misunderstood, as to whether the United States would assume sovereignty over the Spanish colonies "*free of all burdens, all, absolutely all, outstanding obligations and debts of whatsoever kind* and whatever may have been their origin and purpose, remaining thereby chargeable exclusively to Spain."

Replying to this statement, Mr. William R. Day, in a letter of the same date, gives a statement that is worthy of analysis. He says that he will answer the inquiry *seriatum*. Then he takes up the inquiry heretofore quoted from the letter of E. Montero Rios and says emphatically *that the United States would not assume the so-called colonial debts of Spain*. In the last paragraph Mr. Day declares as follows:

> But in respect of the Philippines the American commissioners, while including the cession of the archipelago in the article in which Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the island of Guam in the Ladrones," or in an article expressed in similar words, will agree that their Government shall pay to Spain the sum of $20,000,000.

It is the theory of appellant that the United States paid $20,000,000 for the Philippine Islands, and that in doing so the said sum had nothing to do

with the payment for various improvements or obligations arising therefrom as made by Spain on the islands. But how can such a theory be true if we accept the literal interpretation of Mr. Day's letter, i. e., that they would not accept any articles that required the United States to accept the so-called colonial debts of Spain? Does not this reply of Mr. Day's, taken in connection with the letter of E. Montero Rios, mean, figuratively speaking, that Mr. Day points to the treaty and says, Here is the treaty. We are willing to pay $20,000,000 for any improvements on the Philippine Islands, but we are not willing to assume any of the obligations of Spain on those islands, and we will therefore leave the treaty silent as to the payment of any of these obligations.

CONCLUSION.

We respectfully submit that, in our opinion, the judgment of the lower court should be sustained.

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APPENDIX.

Documents and information not properly within record, but throwing light on contentions made by appellant.

In a communication to the Anglo Saxon Review, made in June, 1899, some time after the signing of the treaty, Mr. Whitelaw Reid, a member of the American commission which drafted the treaty, gives a most enlightening statement regarding the refusal to assume the colonial debts of Spain and the reason why $20,000,000 was paid for the improvements made by Spain in the Philippines.

The communication is as follows:

> Warned by the results of inquiry as to the origin of the Cuban debt, the American commissioners avoided undertaking to assume this *en bloc*. But in their first statement of the claim for cession of sovereignty in the Philippines they were careful to say that they were ready to stipulate "for the assumption of any existing indebtedness of Spain incurred for public works and improvements of a pacific character in the Philippines." Not till they learned that of this entire "Philippine debt" (only issued 1897) over one-fourth had actually been transferred to Cuba to carry on the war against the Cuban insurgents and finally against the United States, and that the most

> of the balance had probably been used in prosecuting the war in Luzon, did the American commissioners abandon the idea of assuming it. *Even they they resolved, in the final transfer, to fix an amount at least equal to the face value of that debt, which could be given to Spain as an acknowledgment for any* pacific improvements she might ever have made there not paid for by the revenues of the islands themselves. She could use it to pay the Philippine bonds if she chose. That was the American view as to the sanctity of public debt legitimately incurred in behalf of ceded territory; and that is an explanation of the money payment in the case of the Philippines, as well as of the precise amount at which it was finally fixed.

It is of peculiar significance that as late as July, 1899, the Spanish Government believed that it was still bound by the concessional contract with appellant. In Magoon's Report on the Law of Civil Government Under Military Occupation (p. 185) he says:

> In July, 1899, the Spanish minister of finance submitted to the Cortes a proposed law for the reorganization of the debts of Spain. In presenting said law Senor Villverde, Spanish minister of finance, stated that the Spanish Government declares that it does not consider that the question of the debts of the colonies ceded and relinquished by Spain were finally settled by the negotiations at Paris nor by the ominous silence of the treaty of peace on the matter. He insisted that the Spanish Government still has the right to insist

that where the revenues of a colony were mortgaged or pledged for the payment of a debt the revenues of the territory constituting said colony should be applied to the payment of said debts, although said territory had been ceded to another sovereignty which refused to take over said obligations and was collecting revenues by virtue of its own right to levy and collect them. The finance minister's official statement was published in the Madrid Gazette and republished by the press of this country.

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